UNITED STATES
v.
JESSE M. TAGGART ET AL.

IBLA 79-7 Decided March 30, 1981

Appeal from decision of Administrative Law Judge Harvey C. Sweitzer, declaring invalid the Blanco One gypsum placer mining claim. Contest W-41986.

Affirmed.

1. Administrative Procedure: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Discovery: Generally

   Where the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of establishing a discovery of valuable mineral deposit by a preponderance of the evidence.

2. Mining Claims: Discovery: Marketability

   A mining claimant may demonstrate present marketability by a favorable showing of such factors as the accessibility of the deposit, proximity to the market, the existence of a present demand, and bona fide efforts to develop the claim and compete in the market.

3. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Marketability

   Where demand is limited to a very few consumers who supply their needs from

their own sources so that the market is "closed" or "captive," a mining claimant must prove that willing consumers exist to whom the claimant could have reasonably expected to sell at a profit. Failure to make that showing will result in a finding that the mineral deposit has no economic value and does not qualify as a discovery.

4. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Marketability

The holding of a mining claim as a reserve for future development without present marketability does not impart validity to the claim.

APPEARANCES: Robert D. Olson, Esq., Goppert, Fitzstephens, Day & Olson, Cody, Wyoming, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Jesse M. Taggart, Janet B. Taggart, the Estate of Grace A. Wight, Letha B. Wight, and Jermy B. Wight appeal from a decision of Administrative Law Judge Harvey C. Sweitzer, dated August 28, 1978, declaring invalid the Blanco One gypsum placer mining claim.

The complaint, brought by the Bureau of Land Management (BLM), following patent application, charged that no discovery of a valuable mineral deposit had been made on the claim because the mineral therein could not be marketed at a profit and it had not been shown that any market existed therefor and that certain land within the claim was non-mineral in character. The Administrative Law Judge held a hearing on June 27 and 28, 1977.

In his decision the Administrative Law Judge held that the Government had established a prima facie case of the lack of a discovery and that appellants had failed to sustain their burden of proof with regard to a discovery. Accordingly, the claim was declared invalid.

In their statement of reasons for appeal, appellants contend that the Government did not establish a prima facie case of the lack of a discovery of a valuable mineral deposit because the Government mineral examiner, who testified as to the lack of a discovery, had no experience with gypsum mining and little general mining experience and because his testimony was not based on "reliable or probative evidence." Furthermore, they argue, the decision of the Administrative Law Judge was "contrary to the weight of evidence."

Pursuant to the mining laws of the United States, the locator of a mining claim is entitled to purchase land containing a valuable mineral deposit. 30 U.S.C. § 22 (1976). A "valuable mineral deposit" has been discovered where minerals have been found in such quantity and quality as to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Chrisman v. Miller, 197 U.S. 313 (1905). This so-called "prudent man" test has been augmented by the "marketability test," which requires a showing that the mineral may be extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968). The Court stated in Coleman at 603 that "the prudent-man test and the marketability test are not distinct standards, but are complementary in that the latter is a refinement of the former."

[1] Where the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward to establish a prima facie case as to that charge; however, the mining claimant has the ultimate burden of establishing a discovery of a valuable mineral deposit by a preponderance of the evidence. Hallenbeck v. Kleppe, 590 F.2d 852, 856 (10th Cir. 1979); United States v. Zweifel, 508 F.2d 1150, 1157 (10th Cir. 1975), cert. denied, 423 U.S. 829 (1976); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

The Government mineral examiner in this case took three surface samples from outcrops on the claim and the analyses of those samples indicated the existence of "very high purity gypsum" (Tr. 32). 1/ There is little, if any, dispute in the record concerning the quality of the gypsum on the Blanco One claim.

The parties disagree, however, on the quantity of the high grade gypsum. The mineral examiner stated that based on the information available to him he could not definitely state whether the material was predominately gypsum or anhydrite (Tr. 46). 2/ He estimated, based on his calculations of the length, thickness, and depth of the bed, that

1/ The Government mineral examiner held a bachelor's degree in geology and his duties with BLM included mineral examination of mining claims. The claim in question was his only experience with a gypsum claim. It is well established that a Government mineral examiner, versed in geology, is qualified to evaluate a mining claim for a particular mineral, even though he does not possess specific experience as to that mineral. United States v. Caldwell, 33 IBLA 153 (1977); United States v. Bartell, 31 IBLA 47, 50 (1977).

2/ Gypsum is a natural hydrated calcium sulfate ($CaSO_4.2H_2O$). Anhydrite is calcium sulfate ($CaSO_4$) (Tr. 33, 34). The mineral examiner testified that anhydrite is "usually of little economic value" (Tr. 35).

the claim contained approximately 1,300,000 tons of gypsum or anhydrite or a mixture of both (Tr. 42, 87). He testified that from his knowledge of how gypsum and anhydrite occur in a natural deposit, it could not be assumed that merely because there is gypsum on the surface that the gypsum will occur at depth (Tr. 87). He indicated that core sampling would be necessary to determine the composition of the deposit (Tr. 43). The Government presented no further evidence on the quantity of the material on the claim. Had the Government rested its case at this juncture, we would have been forced to rule that it had failed to establish a prima facie case. There was no evidence that the high grade gypsum did not continue at depth; only speculation that it might not. A conclusion of lack of discovery based on such speculative evidence could not support a prima facie case. As the Board has stated, such an opinion must be "formed on the basis of probative evidence of the character, quality, and extent of the mineralization allegedly discovered by the claimant. Mere unfounded surmise or conjecture will not suffice, * * *." United States v. Winters, 2 IBLA 329, 335, 78 I.D. 193, (1971). In this case, however, further testimony provided by the mineral examiner established a prima facie case
that gypsum from the Blanco One claim could not be extracted, removed, and marketed at a profit.

The mineral examiner testified that even assuming the entire deposit on the claim was high grade gypsum, there was not a present market for the material (Tr. 106-107). He conducted a survey of the gypsum market in the area and he concluded that "the claim could not be mined at a profit at this point in time" (Tr. 62). 3/ The mineral examiner concluded that "at this time, it would be more expensive to mine this deposit than it would be [to] mine the deposit where Big Horn Gypsum is presently mining" (Tr. 97). 4/ He could not find a market for the material (Tr. 97).

The question presented is whether appellants established by a preponderance of the evidence that the gypsum from its claim could be extracted, removed, and marketed at a profit.

[2] A mining claimant may demonstrate present marketability by a favorable showing of such factors as the accessibility of the deposit, proximity to the market, the existence of a present demand, and bona fide efforts to develop the claim and compete in the market. Clear

3/ The evidence disclosed and the Administrative Law Judge held (Decision at 13) that the only possible market for gypsum from the claim in question was the Celotex Big Horn Gypsum Company wallboard plant located at Cody, Wyoming.

4/ This conclusion was based, in part, on his determination that mining at least the west side of the Blanco One claim would entail a higher "stripping ratio," i.e., ratio of thickness of overburden to thickness of mineral deposit, than for the Big Horn operation (Tr. 93).

Gravel Enterprises, Inc. v. Keil, 505 F.2d 180, 181 (9th Cir. 1974); Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972); United States v. McCall, 2 IBLA 64, 73, 78 I.D. 71, 79 (1971), aff'd, McCall v. Boyles, Civ. No. 77-3429 (9th Cir. July 10, 1980).

[3] With respect to the marketability test, a showing which merely establishes that a given market is receiving an adequate supply of the mineral in question to meet the demand is not a sufficient basis for concluding that supplies from another source are not marketable at a profit. United States v. Gibbs, 13 IBLA 382, 393 (1973); accord, Melluzzo v. Morton, 534 F.2d 860, 863 n.2 (9th Cir. 1976). However, where demand is limited to a very few consumers who supply their needs from their own sources so that the market is "closed" or "captive," a mining claimant must prove that willing consumers exist to whom the claimant could have reasonably expected to sell at a profit. Failure to make that showing will result in a finding that the mineral deposit has no economic value and does not qualify as a discovery. United States v. Duval, 1 IBLA 103 (1970), aff'd, Duval v. Morton, 347 F. Supp. 501 (D. Ore. 1972), aff'd, Civ. No. 72-2839 (9th Cir. Dec. 19, 1973); see United States v. Bartlett, 2 IBLA 274, 279, 78 I.D. 173, 178 (1971).

The plant manager for Celotex Big Horn testified for appellants. He stated that since his company began production in 1961 it obtained and continued to obtain gypsum from mining claims owned by the company and located approximately 4 miles southwest of the town of Cody, Wyoming (Tr. 66-72). He stated that the company was beginning to incur increased costs for removal of overburden, but that "[w]ith the work that we have done in the quarry this year -- * * * we should have an ample supply for the next six years, which would then give us ample time to uncover or remove overburden in another area" (Tr. 74).

He indicated that the company had not actively sought other sources of gypsum (Tr. 74). No one has offered Celotex the same quality gypsum at a lower price (Tr. 75). While he had general discussions with one of appellants in 1975 and indicated that the company would be interested in quality gypsum of required tonnage at a lower price, appellants never made any material available (Tr. 75). He estimated that approximately 50 to 60 percent of the present source of gypsum on the Big Horn claims has not been core drilled to determine the quantity of gypsum available (Tr. 79). According to him, availability and costs of removal are prime considerations in determining the source of any supply of gypsum (Tr. 70). He testified that his company would be interested in gypsum of proper quality and quantity from the Blanco One claim. He stated "[a]ny time we could buy anything cheaper, we naturally would be very interested in it" (Tr. 67).

Jesse M. Taggart, one of the appellants, was employed by the Pat O'Hara Company. That company performed the mining and hauling of the

gypsum on the claims owned by Big Horn (Tr. 116). He admitted that one could not determine whether an outcrop of gypsum extended to depth without core drilling (Tr. 178). However, he asserted that appellants had drilled 19 holes on the Blanco One claim to depths of approximately 8 to 50 feet and had not encountered anhydrite (Tr. 158-59). 5/

It was Taggart's belief that the Blanco One claim could presently be mined at approximately the same cost and expense involved in the Big Horn mining operation (Tr. 132). He also believed that appellants could "mine the gypsum [from the Blanco One claim] and offer it to Ideal Cement at a competitive price" (Tr. 137). 6/

Taggart stated that some of the costs involved in mining gypsum were hauling, road maintenance, removal of any overburden, labor, powder, and equipment (Tr. 146). He believed that material from the Blanco One could be provided to Celotex at less cost than from their present source because of Celotex's costs for overburden removal (Tr. 147). He conceded that appellants did not have legal access to the Blanco One claim, but he believed it could be obtained (Tr. 147). The area for access was partly privately owned by third persons and partly Government owned. Appellants had obtained no easement. He did not know what the cost of acquiring an easement might be (Tr. 210-12). 7/

From Taggart's testimony it appeared that appellants believed they could run a profitable operation on the Blanco One claim primarily because of the increased costs being confronted by Big Horn due to overburden removal. However, he admitted that there would be at least some overburden expense on the Blanco One claim (Tr. 163). He felt the "stripping ratio" on the Blanco One claim would be "minimal" (Tr. 164). When asked why he had not quoted any prices to Celotex, he stated that "[y]ou can't quote prices on something you don't own" (Tr. 166). He

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5/ He stated that they would have known if they hit anhydrite because it is a much harder formation than gypsum and their drill bits would have been broken (Tr. 118).

6/ In a letter dated June 22, 1977, in response to an inquiry by one of appellants, the Sales Manager, Ideal Basic Industries, Cement Division, Billings, Montana, stated: "Should you be in a position to provide the quantities and qualities of material at a competitive price basis, we would be most happy to discuss a potential purchase agreement with you" (Contestee's Exh. B).

7/ While mining claimants and other entrymen have historically been regarded as having a right of access over public lands to entered lands, there is no evidence in the record concerning the amount of privately held land that would be traversed by an access road, nor any cost figures for the acquisition of an easement from third persons.

said they were waiting for patent; however, he stated that nothing prevented them from producing from the claim prior to patent (Tr. 166).

Appellants determined that Celotex was a market when

> [w]e could foresee -- when I say 'we' we were operating the mine [for Big Horn], and we could foresee this high stripping cost that Big Horn is now facing. We could see this four years ago, and we knew that if we could patent these claims that it was only a question of time until we could market it.

(Tr. 161). He elaborated by stating:

> Well, as I said before, this is something we could see a few years ago that they were going to have to face. We had made the patent application and were well paid. Big Horn's expense -- in stripping the overburden we are getting well paid for what we are doing here, and we look at them as somewhat of a reserve, still feeling that soon Big Horn is going to be looking at them. [8/] [Emphasis added.]

(Tr. 166).

Seldon Willis, a former employee of the Taggart Construction Company who had retired in 1967, testified that he had had 20 years experience as a bidder and estimator on road construction projects (Tr. 181-82). Some of his experience was on estimating and bidding on roads in mountainous areas (Tr. 182). In an admittedly rough estimate he considered the cost of building a road from the Blanco One claim to the county road to be $200,000 (Tr. 182-83, 196). The estimate did not include the cost of acquiring an easement over privately-owned land (Tr. 194, 204). His estimate was based on experience, rather than a formal paper and pencil calculation (Tr. 196). He stated that the Blanco One claim was approximately 3 miles further from the Big Horn plant than the Big Horn claims (Tr. 184). Although he did not know the thickness of the deposit on the Blanco One claim nor the stripping ratio (Tr. 201-02), he ventured an opinion that the Blanco One claim "could

8/ Taggart's reference to the Blanco One claim in the plural was apparently explained by counsel for appellants when questioned by the Administrative Law Judge at the hearing. The Administrative Law Judge stated: "Let me interrupt you. You use the pronoun "they" in reference to [the Blanco One claim]. Do you mean "it"? Counsel responded: "Yes, the confusion is, Your Honor, originally they were located as two lode claims and now they are located as one placer claim, and it is only one" (Tr. 12).

probably be mined cheaper -- a little cheaper right now than at the present claim" (Tr. 192).

[4] Appellants have failed to establish the marketability of the gypsum from their claim. While Celotex indicated an interest in gypsum of proper quality and quantity from the Blanco One claim, its interest was keyed to price. There was no showing of the price Celotex might be willing to pay nor did appellants indicate the price at which gypsum from the claim could be offered. Moreover, appellants provided no evidence of production costs. Their rationale for concluding that gypsum could be extracted, removed, and marketed at a profit was based primarily on their experience in the gypsum mining business and was not grounded on any tangible evidence. 9/ In fact, the record seems to indicate that appellants were not presently interested in developing the Blanco One claim. They considered the claim to be "somewhat of a reserve" (Tr. 166) and felt that if they could patent the claim it would only be a "question of time until we could market it" (Tr. 161).

Locations based on speculation that there may at some future date be a market for the discovered material cannot be sustained. Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); Isbell Construction Co. 4 IBLA 205, 78 I.D. 385 (1971). Apparently, appellants intended to hold the Blanco One claim until the overburden removal costs at the Big Horn claims became so great as to allow the material on the Blanco One claim to be competitively marketed. Clearly, the holding of a mining claim as a reserve for future development without present marketability does not impart validity to the claim. Barrows v. Hickel, supra; United States v. Gibbs, supra at 396; United States v. Stewart, 5 IBLA 39, 79 I.D. 27 (1972). In Clear Gravel Enterprises v. Keil, supra at 181, the court said, "While the marketability of the mineral could have been demonstrated by the Appellant by a showing of its accessibility, its proximity to the market, the demand for it and by Appellant's bona fide efforts to develop the claims and compete in the market with the product extracted from those claims, nonetheless, the record demonstrates that Appellant's evidence fell far short of the required showing." In this case, appellants' evidence suffers from the same infirmity.

The Administrative Law Judge properly concluded that appellants failed to establish by a preponderance of the evidence that the discovery test was met.

9/ In McCall v. Andrus, 628 F.2d 1185, 1189 (9th Cir. 1980), the court noted, "Although one of McCall's experts stated that the sand and gravel from the contested area could have been marketed at a profit, he admitted he had not made a market study."

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Edward W. Stuebing
Administrative Judge